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IN THE

# Supreme Court of the United States

October Term, 1944.

No. 1373 127

STANDARD LIME AND STONE COMPANY,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.**

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NATIONAL LABOR RELATIONS BOARD,
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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:*

The Petitioner, Standard Lime and Stone Company, a Maryland Corporation, prays that a writ of certiorari issue to review the order or decree of the Circuit Court of Appeals for the Fourth Circuit entered on May 11, 1945, for the enforcement of the order of the National Labor Relations Board, dated July 13, 1945, directing Petitioner to bargain collectively with United Cement, Lime and Gypsum Workers International Union, A. F. of L., etc.

## OPINIONS BELOW.

The opinion of the Court below, filed May 11, 1945, is not yet reported, but is included in the record (R. 45). The decision and order of the National Labor Relations Board, dated July 13, 1944, is included in the record at R. 1-17.

## BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 [28 U. S. C., Sec. 347 (a)], as authorized by Section 10 (e) of the National Labor Relations Act [49 Stat. 449, 29 U. S. C., Sec. 160 (e)].

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed May 11, 1945; its order or decree was entered May 11, 1945. Application for a stay pending application in this Court for writ of certiorari was made May 22, 1945, and the order granting the stay for 30 days pending the application for writ of certiorari in this Court was entered May 24, 1945.

## QUESTIONS PRESENTED.

The Circuit Court could properly order enforcement of the Board's order directing Petitioner to bargain collectively with the A. F. of L. Union provided that Union had been properly certified by the Board, under Section 9 (a) of the National Labor Relations Act, as the exclusive bargaining agent of its employees. The question is whether or not the Board's certification of the Union was lawful and proper.

In this connection, Petitioner now asks this Court to consider the following questions, all of which were decided adversely to Petitioner's contention by the Circuit Court of Appeals and the Board:

1. Does Section 9 (a) of the National Labor Relations Act [29 U. S. C., Sec. 159 (a)], providing that "Representatives designated or selected * * * by the majority of the employees * * * shall be the exclusive representatives of all the employees," permit the Board to certify a union as exclusive bargaining agent when at the election held by the Board less than a majority of the employees cast ballots or participated in the election?

2. If Section 9 (a) does not prohibit certification in such cases, can the Board certify solely on the basis of the majority vote of the minority participating in the election, or must not the Board have before it additional evidence sufficient to justify a finding that the minority vote was, in fact, truly representative?

3. Where the Board holds an election with each of two unions and "Neither" on the ballot, with the result that neither of the unions nor "Neither" receives a majority of the votes cast, with "Neither" running third; and the Board eliminates "Neither" from the ballot and holds a so called "run off" election between the two unions, does the Board's elimination of "Neither" from the ballot make the second election, and the Board's certification of the union based thereon, invalid?

## SUMMARY STATEMENT.

On April 13, 1943, the Board conducted a secret ballot election among Petitioner's maintenance and production employees to determine their exclusive bargaining agent (R. 34). At this first election, there were three places on the ballot: (1) the United Cement, Lime and Gypsum Workers International Union, A. F. of L., (2) United Construction Workers, Division of District 50, U. M. W., Local 202, and (3) "Neither." 439 employees were

eligible to vote in the election, and all of them appeared on the eligibility list posted throughout the plant. 218 cast ballots; no one received a majority of the votes cast, and "Neither" ran third, as follows:

| | |
|---|---|
| A. F. of L. | 99 |
| U. M. W. | 62 |
| "Neither" | 57 |
| | 218 |

(R. 20-24)

On May 13, 1943 the Board held a second or so called "run off" election at the instance of both labor organizations (R. 21; Bd. Exh. 2-J; Bd. Exh. 2-K). The Board eliminated "Neither" from the ballot at the second election, and the vote was between the A. F. of L. Union and U. M. W. (R. 21, 35-6; Bd. Exh. 2-N).

At this second election, there were 409 eligible voters, and all of them appeared on the eligibility list posted throughout the plant. 166 ballots were cast, as follows:

| | |
|---|---|
| A. F. L. Union | 137 |
| U. M. W. | 28 |
| Void | 1 |
| | 166 |

(R. 22, 37)

Thus, only 33.7% of the employees entitled to vote voted for the A. F. of L., and only 40% participated in the election. Nevertheless, on June 1, 1943, the Board certified the A. F. of L. Union as the exclusive bargaining representative (R. 37-9; 50 N. L. R. B. 34).

The Board certified the A. F. of L. Union entirely on the basis of the fact that, in its opinion, Section 9 (a) of the Act was properly construed to adopt a principle of minority participation, i. e., that a majority of a minority

can elect (R. 38). The record discloses no facts or evidence upon which to base a finding or conclusion that the minority vote polled at the election was representative of the wishes of the majority. This fact and its importance is discussed at pp. 6-7 below and at pp. 17-8 of our Brief.

In September, 1943, the A. F. of L. Union asked Petitioner to negotiate, but Petitioner refused, contending that the action of the Board in certifying the A. F. of L. Union was illegal (R. 23-4; Bd. Exhs. 3-A, 3-G). The A. F. of L. Union claimed that Petitioners refusal to bargain was "an unfair labor practice," and was upheld by the Board (R. 1-17, 25). On July 13, 1944, the Board ordered Petitioner, upon request, to bargain with the A. F. of L. Union (R. 3-4). Upon failure of Petitioner so to do, the Board petitioned the Circuit Court for the enforcement of its aforesaid order, and by its order and opinion hereinabove referred to, the Circuit Court has ordered enforcement of the Board's order (R. 53).

## REASONS FOR GRANTING THIS PETITION.

The Circuit Court of Appeals for the Fourth Circuit has decided important questions of federal law which have not been, but should be, settled by this Court.

Section 9 (a) of the National Labor Relations Act should not be construed, as held below, to permit a majority of a minority to elect. Our Brief shows that the statutory language and the authorities do not permit that construction; and that if they did, it would only be in cases where there was some evidence to support a finding that the minority vote was in fact truly representative. But the Circuit Court below, arbitrarily and without any basis for so doing, held that the "conclusive answer" in the case now presented was this Court's decision in *Virginian Railway v. System Federation,* 84 F. (2d) 641

(C. C. A. 4th 1936), *aff'd.*, 300 U. S. 515 (1937) where this Court construed the differently worded election provision of the prior Railway Labor Act in a case where the majority participated.

This Court has never been asked to consider a case like that now presented, although this Court has denied certiorari in several cases where only a minority participated in the vote.

The record in those cases contained evidence, in addition to the election tally, upon which a finding could be based that the minority vote was in fact truly representative; that additional evidence in *New York Handkerchief Manufacturing Co. v. N. L. R. B.*, 114 F. (2d) 144 (C. C. A. 7th 1940), *cert. den.*, 311 U. S. 704, and in *N. L. R. B. v. National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7th 1943), *cert. den.*, 320 U. S. 753, was that the Company had interferred with the election and prevented employees from voting; that additional evidence in *N. L. R. B. v. Central Dispensary and Emergency Hospital*, 145 F. (2d) 852 (Ct. of App. D. of C. 1944, *cert. den.*, 65 S. C. 684, was the high rate of turnover among the employees, making it probable that those voting, although not a majority of those included on the eligibility list, were actually a majority of those entitled to vote at the time of the election.

In the case now presented, the record contains no evidence to support a finding that the minority vote polled at the election was representative of the wishes of the majority.

A second important question of federal law arises from the Board's elimination of "Neither" from the ballot at the second or run off election. In so doing, the Board made a decision for the employees which the employees were there to decide for themselves, and which, as a part of any fair election process, should have been submitted to the employees.

The Board's elimination of "Neither" from the ballot disregarded the fact that, because of an elected union's power by a closed shop agreement to force members of a rival union to change affiliation, supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. The employees should have been permitted to decide at the ballot box whether they preferred "Neither" to a run off vote later between the two unions. The statute contemplates an election by the employees, not an election partly by the Board.

Also there is a conflict between the Fourth Circuit's decision below and the decisions by other Circuit Courts of Appeals. See *New York Handkerchief Manufacturing Co. v. N. L. R. B.*, 114 F. (2d) 144 (C. C. A. 7th 1940); *N. L. R. B. v. National Mineral Co.*, 134 F. (2d) 424 (C. C. A. 7th 1943; *N. L. R. B. v. Central Dispensary and Emergency Hospital*, 145 F. (2d) 852 (Ct. of App. D. of C. 1944).

As more fully shown in our Brief, pp. 14-18, these cases, in which certification was approved where only a minority participated in the vote, required additional evidence before the Board, over and above the election tally, upon which it might base a finding that the small participation in the election was nevertheless actually representative. The Fourth Circuit in Petitioner's case, however, found no necessity for any such additional evidence, and approved the Board's certification based solely upon the minority vote.

See also, *N. L. R. B. v. Whittier Mills*, 111 F. (2d) 474 (C. C. A. 5th, 1940), requiring majority participation in the vote.

In conclusion, the decision below interpreting an important statute of the United States reaches an unsound and undesirable result, is in conflict with decisions of the

Fifth and Seventh Circuits and of the Court of Appeals for the District of Columbia; and the determination of the questions presented to this Court will settle the law and remove the uncertainty.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

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## BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

### OPINIONS BELOW.

The opinion of the Court below, filed May 11, 1945, is not yet reported, but is included in the record (R. 45). The decision and order of the National Labor Relations Board, dated July 13, 1944, is included in the record at R. 1-17.

### GROUNDS FOR JURISDICTION.

Jurisdiction is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43

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A concise statement of the grounds on which the jurisdiction of this Court is invoked is contained in the Petition at pp. 5-8, reference to which is hereby respectfully made.

## STATEMENT OF THE CASE.

A concise statement of the case is included in the Petition at pp. 3-5, reference to which is hereby respectfully made.

## SPECIFICATIONS OF ERRORS.

The decision of the Circuit Court below was that the certification by the National Labor Relations Board of the United Cement, Lime and Gypsum Workers International Union, A. F. of L., as the exclusive bargaining agent of Petitioner's employees was lawful and proper, so that the Board's later order directing Petitioner to bargain collectively with the A. F. of L. should be enforced. In so holding, the Circuit Court made the following errors hereby urged:

1. The Circuit Court erroneously held that Sec. 9 (a) of the National Labor Relations Act [29 U. S. C., Sec. 159 (a)], providing that "Representatives designated or selected * * * by the majority of the employees * * * shall

be the exclusive representatives of all the employees," permits the Board to certify a union as exclusive bargaining agent when at the election held by the Board less than a majority of the employees cast ballots or participated in the election.

2. The Circuit Court erroneously held that the Board can certify solely on the basis of the majority vote of the minority participating in the election, and need not have before it any additional evidence upon which to base a finding that the minority vote was, in fact, truly representative.

3. The Circuit Court erroneously held that where the Board holds an election with each of two unions and "Neither" on the ballot, with the result that neither of the unions nor "Neither" receives a majority of the votes cast, with "Neither" running third; and the Board eliminates "Neither" from the ballot and holds a so called "run off' 'election between the two unions, the Board's elimination of "Neither" from the ballot does not invalidate the second election, or the Board's certification of the union based thereon.

## SUMMARY OF ARGUMENT.

The statutory language to be construed is "Representatives designated or selected * * * by the majority of the employees * * * ". NLRA, Sec. 9 (a), 26 U. S. C. Sec. 159 (a). The key words in the statute are "designated or selected". Clearly a majority has not "designated or selected" when a majority has not even participated.

The employee's position in a labor election is more analogous to that of a corporate stockholder than a political voter; the number entitled to vote is definitely known; the employee's direct personal and property interests are affected; and the corporate rule in most instances of

majority participation, and not the political rule, should be adopted here.

Admittedly, it can be argued that the earlier Railway Labor Act, providing that the majority "shall have the right to determine" the representative, requires only that the opportunity be afforded; and that holding an election at which all have the right to vote if they want, satisfies the RLA provision. But the NLRA clause now before the Court is "designated or selected". That phraseology requires affirmative action. Certainly a majority has not "designated or selected" when a majority has not even participated.

The Circuit Court below, arbitrarily and without any basis for so doing, held that this Court's decision in *Virginian Railway v. System Federation,* 84 F. (2d) 641 (C. C. A. 4th 1936), *aff'd.,* 300 U. S. 515 (1937), was the "conclusive answer" in the case now presented.

But this Court did not hold in the *Virginian* case that under the election provision of the earlier Railway Labor Act, a majority vote of the minority participating in the election can elect. *There, a majority participated.* If that had been the holding, that case would not control as to NLRA elections for the reason, among others, that the two election provisions are differently worded, the committee reports thereon show a differing Congressional intent, and the 1934 RLA provision was copied *verbatim* from a then existing rule of the U. S. Labor Board which had already been construed by the Board to adopt a minority participation rule. This latter fact was stressed by this Court in its construction of the RLA in the *Virginian* case.

Hence, the proper construction of the RLA and the NLRA election provisions are two separate and distinct questions: the *Virginian Railway* case and other court decisions construing the RLA are not binding precedents on the NLRA.

Only three court decisions construing the NLRA election provision have involved a minority participation in the vote. In each of those cases, the Board was required to have before it in addition to the election tally evidence upon which to base a finding that the small participation therein was nevertheless actually representative. But in *Standard's* case, there is not a shred of evidence in the record to justify such a finding. The fact that the second election again resulted in a minority turnout was affirmative evidence that the vote was not representative.

By eliminating "Neither" from the ballot at the second election, the Board made a decision for the employees which the employees were there to decide for themselves, and which, as a part of any fair election process, should have been submitted to the employees.

The Board's elimination of "Neither" from the ballot disregarded the fact that, because of an elected union's power by a closed shop agreement to force members of a rival union to change affiliation, supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. The employees should have been permitted to decide at the ballot box whether they preferred "Neither" to a run off vote later between the two unions. The statute contemplates an election by the employees, not an election partly by the Board.

## ARGUMENT.

### I.

### Section 9 (a) Requires A Majority Participation.

Section 9(a) of the National Labor Relations Act provides:

> "Representatives designated or selected * * * by the majority of the employees * * * shall be the exclusive representative of all the employees" etc.
> 29 USC, Sec. 159 (a).

Section 9(c) of the Act further provides that if a controversy arises on the question of representation, the Board,

> "* * * may investigate such controversy and certify * * * the representatives that have been designated or selected. In any such investigation, the Board * * * may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives".
>
> 29 USC, Sec. 159 (c).

The statute says that the exclusive bargaining agent shall be "designated or selected * * * by the majority of the employees". Whether determined by "secret ballot" or "other suitable method" as authorized by Section 9(c), the statutory mandate is "designated or selected * * * by a majority of the employees". We say that *if* the statute does not require a majority vote of all those entitled to vote to elect, the least it requires is majority participation in the vote. The key words in the statute are "designated or selected". Clearly a majority has not "designated or selected" when a majority has not even participated.

By holding that mere minority participation satisfies the statute, the Circuit Court below necessarily inserted additional words into the statute; making the statute read:

> "* * * designated or selected * * * by the majority of the employees *who actually voted*" (Italicized words added).

But the words used by Congress have a perfectly reasonable and clear meaning without adding to them.

Webster's Dictionary defines the word "designate" as meaning "to indicate, show, to name, to set apart", and the word "select" as meaning "to pick out, choose, to take instead of others, as to select a book".

We say that the very language of the Act requires the affirmative action of employees, and not their mere passive acquiescence, and that the words used in the Act should be given by the Board and Courts their normal meaning unless there is clear and positive evidence that the Congressional intent was otherwise.

The Courts in construing other language of this Act have applied the normal meaning to the words used.

See NLRB vs. Swank Products Co., 108 Fed. (2) 872 (CCA 3d, 1939).

In the above case the Court said, in discussing other words used in this Act (see p. 874)—

> "acquiescence has none of the positive and aggressive quality contemplated by such words as 'interfere', 'restrain', 'coerce' and 'dominate' which we find in the Act".

Applying the Court's reasoning in the above case we say that the words "designate" or "select" require positive and affirmative acts; and that the NLRB and the Circuit Court below erred in determining that mere passive acquiescence meets the requirements under this langauge in the Act.

Consider also the voting rules in other situations:

Majority participation is the general rule not only in parliamentary and legislative bodies, but in the election and management proceedings of corporations as well.

13 Am. Jur., Corporations, Secs. 480, 960.

Sec. 480 reads:

> "In most instances it will be found that the question as to what constitutes a quorum for the purpose of transacting business at stockholders' meetings is governed by statute or by rules and regulations of the corporation, * * *."

And Mr. Thompson says:

> "This question of the quorum at a stockholders' meeting is now settled almost universally by statute. * * * Statutes usually require a representation of a majority of all the stock to constitute a quorum * * *."
>
> 2 Thompson, Corporations (1927), Sec. 940.

In the case of political elections, usually only minority participation is required. But, as illustrated by the case of *Carroll County v. Smith*, 111 U. S. 556 (1884), this is often because the statute expressly so provides: in that case, the statute referred to "two-thirds of the qualified voters," and the Court said (at p. 565) that "voters" could not include a person who did not actually vote. The adoption of minority participation as the rule in political elections is practically forced by the impossibility of determining definitely the actual number entitled to vote (death, changes of residence, etc.).

We submit that the employees' position in a labor election is more analogous to that of a corporate stockholder than a political voter. In labor elections the total entitled to vote is definitely known; they are current employees on the pay roll, their names are posted on an eligibility list throughout the plant. Unlike the political voter, and like the stockholder, the employees' direct personal and property interests are involved in the vote, because the elected labor representative is the exclusive bargaining agent for all as to wages, hours, and working conditions.

We submit as unsound the Circuit Court's decision that the NLRA election provision should be construed to adopt the political rule, or the archaic common law corporate rule which long before the NLRA was universally outmoded by the modern statutory "quorum" rule.

The Circuit Court below justifies its minority participation views by saying that a sole bargaining representative is chosen, not—

> "for the employees in their private and personal capacities, but * * * to represent a constituency because it is in the public interest that the constituency be represented; * * *."

The Circuit Court cited NLRA, Sec. 1 (29 U. S. C. Sec. 151) as declaring this policy of obtaining a bargaining agent in any event, without regard to the employees' personal interest. But nothing in Sec. 1 minimizes the direct personal and property interest of the employees in the vote; in fact, when Sec. 1 refers to "the right of employees to organize," "full freedom of association," "protection by law of the right of employees to organize," "full freedom of association, self organization and designation of representatives of their own choosing," certainly the Act is putting the workers' interest first.

In the case of *NLRB vs. Whittier Mills,* 111 Fed. (2) 474 (C. C. A. 5th, 1940), the Court laid down the following rule (see pp. 477-8)—

> "Where with fair opportunity to all members of the unit to vote, a majority do vote, they are, so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting and suffices to select the bargaining representatives of the unit".

We, therefore, submit that Section 9(a) requires a majority participation.

**The Railway Labor Act and Cases Thereunder.**

Both the Board and the Circuit Court below thought (1) that Congress, when Section 9(a) of the National Labor Relations Act became law in 1935, in effect incorporated into the National Labor Relations Act the election provision of the prior Railway Labor Act; and (2) that the decision under the latter Act in the *Virginian Railway*

case settled the question in favor of mere minority participation.

We submit that the election provisions of the two statutes have different meaning; as shown by the different wording of the statutes and the differing Congressional Committee reports thereon:

*The Two Statutes Compared:* The Railway Labor Act provision is that,

> "• • • the majority • • • of employees shall have the right to determine who shall be the representative • • • ".
>
> Railway Labor Act, Sec. 2, Fourth
> 45 USC, Sec. 152, Fourth.

But that is very different language from the National Labor Relations Act's wording, as follows:

> "representatives designated or selected • • • by the majority of the employees • • • ".
>
> National Labor Relations Act, Sec. 9 (a).
> 29 USC, Sec. 159 (a).

Admittedly it can be argued that the RLA phraseology that the majority "shall have the right to determine," requires only that the opportunity be afforded; and that holding an election at which all have the right to vote if they want, satisfies the RLA provision.

Not so in the case of the NLRA now before the Court: "designated or selected" is the clause. We say that the phraseology of the National Labor Relations Act requires affirmative action to "designate or select". Certainly a "majority of the employees" has *not* "designated or selected" where a majority has not even participated.

*Congressional Committee Reports:* A committee report on the 1934 amendment to RLA, Sec. 2, described that Section—

"'the bill specifically provides that the choice of representatives in any craft shall be determined *by a majority of the employees voting on the question*' (Italics supplied)."

Report (No. 1065) of Committee on Interstate Commerce to accompany S. 3266, May 10, 1934, 73d Congress, 2d Sess., p. 2.

But what has that to do with the differently worded NLRA Sec. 9(a), passed in 1935, which was accompanied by its own Committee Report, also differently worded:

"Section 9 (a) incorporates the majority rule principle, that representatives designated for the purpose of collecting bargaining by the majority of the employees in the appropriate unit shall be the exclusive representatives of all the employees" etc.

Report (No. 1147) of the House Committee on Labor to accompany S. 1958, June 10, 1935, 74th Cong., 1st Sess., p. 19.

The Circuit Court below said this last quoted NLRA Committee Report "expressly stated" that NLRA Sec. 9 (a) was intended to adopt a minority participation rule. The only explanation of this manifest error must be that the Circuit Court confused in its mind the NLRA Committee Report and the RLA Committee Report.

If Section 9 (a) of NLRA had been intended to mean the same as Section 2 of RLA, the normal course would have been to copy Section 2. But the statutes and the Committee Reports used different language.

With the above in mind, the fact that the NLRA Committee Report stated that Act to be "an amplification and further clarification of the principles" of the RLA could hardly mean that one Act is the replica of the other; "amplification" implies change.

*The Virginian Railway Case:* In spite of the different wording of the two election provisions, the Circuit Court below nevertheless held that this Court's decision in *Virginian Railway v. System Federation,* 84 F. (2d) 641 (CCA 4th, 1936), aff'd. 300 U. S. 515 (1937) was the "conclusive answer" in the case now presented. But that case is not controlling here:

1. There, *a majority* of those entitled to vote had participated in the RLA election. Both this Court and the Circuit Court reserved any decision on the question of mere minority participation.

2. Reasons given by this Court (at pp. 560-1) and by the Circuit Court (at pp. 652-3) for adopting the political rule are inapplicable here:

(a) This Court said "an indifferent minority" (those not voting) should not prevent an election. The Circuit Court had expressed the same idea that "elections must frequently fail" if a majority vote (as distinguished from mere majority participation) were required.

Here, this Court's "indifferent minority" is a majority. And with only majority *participation* required, the failure of elections from non-participation will be relatively infrequent. Normally, 80% of all employees eligible to vote in Board elections actually cast ballots. See Ninth Annual Report of the NLRB (G. P. O. 1944) 19; Eighth Annual Report of the NLRB (G. P. O. 1943) 24.

(b) This Court referred to the danger of "the absence of eligible voters" due to "coercion by the employer". The Circuit Court having shown at p. 643 that the Company had done its best to keep the employees from voting, had expressed the same thought in saying

the election might be nullified "where the employer, as in the case at bar, is opposed to change".

But in Standard's case, there was no absence of voters due "to coercion by the employer", or because "the employer was opposed to change". On the contrary, Standard Lime's cooperation in holding a fair election was so complete that the record includes the Board's stipulation to that effect (R. 10, 20-3).

(c) This Court had a reason not used by the Circuit Court; if found Congressional intent in the fact that the 1934 RLA provision had been copied *verbatim* from a then existing rule of the U. S. Labor Board; which rule, prior to the 1934 RLA amendment, had been construed by the Board to adopt the political rule. But the NLRA provision now before the Court uses language entirely different from the Labor Board rule and the RLA provision; Court decisions construing one are not binding precedents on the other.

(d) The Circuit Court had a reason not used by this Court:

> "* * * If the employees are already represented, the failure to vote will be a vote against change; * * *"

Here, the employees were not already represented. Prior to the elections, the Independent had voluntarily withdrawn as representative (R. 29).

The *Virginian Railway* case actually held against minority participation. The decision by the District Court in the *Virginian Railway* case, 11 Fed. Sup. 621, 628 (E. D. Va. 1935), as to the car men and coach cleaners (craft election) held that under the RLA, as a majority did not participate, a valid certification in this craft could not be made. This ruling was not appealed.

**The National Labor Relations Act and Cases Thereunder.**

The Circuit Court below cited the following court decisions as holding that, under Sec. 9 (a) of NLRA, a majority of a minority can elect:

New York Handkerchief Mfg. Co. vs. N. L. R. B., 114 Fed. (2) 144 (CCA 7th, 1940);
N. L. R. B. vs. National Mineral Co., 134 Fed. (2) 424 (CCA 7th, 1943);
Whittier Mills Co. vs. N. L. R. B., 111 Fed. (2) 474 (CCA 5th, 1940);
Marlin-Rockwell Corp. vs. N. L. R. B., 116 Fed. (2) 586 (CCA 2d, 1941);
N. L. R. B. vs. Central Dispensary and Emergency Hospital 145 Fed. (2) 8521 (Ct. of App. D. of C. 1944).

In the *New York Handkerchief Company* case the Court affirmed the Board's certification where less than a majority participated, and the Court, page 148, held:

> "The authority of the Board to certify the Union under such circumstances presents an important question not free from doubt. In this connection it must be kept in mind that we have sustained the Board's finding to the effect that petitioner was guilty of coercion and intimidation against its employees, which no doubt prevented many of them from participation in the election."

In the *National Mineral* case the Board found, and the Court affirmed its finding, page 428, that:

> "The Company's conduct was an interference with the election and was responsible for the small number voting."

and the Court further said,

> "In the instant case as found by the Board, petitioner by its unlawful conduct interfered with the

> right of its employees to participate in the election and, no doubt, was responsible for the small proportion of its employees voting."

To the contrary in the Standard's case, the Company cooperated with the Board in all respects in holding both elections. The Report of the Trial Examiner states,

> "The pleadings contain no allegation of irregularity in the conduct of the election * * *." (R. 8.)

Standard's cooperation was so complete that the record includes the following stipulation by the Board:

> "Respondent cooperated with the Board in holding said election by furnishing its pay-roll list, provided a room in its plant for said election, furnishing voting booths, one of its employees to act as an authorized observer, and posting the notices on the bulletin boards throughout the plant in reference to said election as requested by the Board." (R. 22.)

The Board made substantially the same stipulation as to the first election (R. 20).

In the *Whittier Mills* case, a majority of employees voted in each election, and the point in issue was whether a certification was valid when based on the affirmative act of less than a majority, when a majority participated. The Court held (see pp. 477-8)—

> "Where with fair opportunity to all members of the unit to vote, a majority do vote they are, so to speak, a quorum to settle the matter, and the majority of that quorum binds those not voting and suffices to select the bargaining representative of the unit."

This case affirms our contention.

In the *Marlin-Rockwell Corporation* case a majority participated in the election, and the issue was whether

under the Act a majority of all in the appropriate unit must vote for the union. The Court, page 588, held,

> "Under the Railway Labor Act it has been authoritatively held that the vote by a majority of the participants determines the choice if the election was participated in by a majority of employees entitled to vote" (citing Virginia Railway and Whittier Mills cases).

The *Emergency Hospital* case, decided by the Circuit Court of Appeals for the District of Columbia in 1944, was a case in which less than a majority participated. In this case the Board, as appears from its decision, conducted an independent investigation following the balloting, to ascertain whether the election was fair and representative. It found that it was; one of its reasons being (see 46 NLRB 437, 438)—

> "Moreover, the Board's investigation in this matter has disclosed, as the record indicates, that the Hospital has a high rate of turnover, so that a substantial number of those whose names appeared upon the pay roll used to determine eligibility to vote in the election were no longer employed by the Hospital at the time of the election. * * * "

This condition should be contrasted with the normal employment condition stipulated in *Standard's* case—

> "that on April 13, 1943, and May 13, 1943, the days of the election at respondent's plant, the operations at said plant were normal with respect to number of employees working at said plant, and that the notices posted throughout the plant were ample to give notice to employees of the time and place of holding said election." (R. 25.)

On the above set of facts, which are quite different from the facts in the Standard case, the Court, in the *Emergency Hospital* case, held (see p. 854):

> "The real test is whether the election is actually representative. This is always a question of fact in the particular case. The Board has recognized this principle by an administrative ruling that in minority elections *it will investigate and determine whether the election was actually representative. It did so in this case and affirmatively found that the election was representative.*" (Italics ours.)

Thus, it appears that in the only three Court decisions involving a minority participation in the vote, i. e., the *New York Handkerchief Co.* case, the *National Mineral* case, and the *Emergency Hospital* case, the courts all qualified their approval of union certification by the Board.

The Board was required to have before it in addition to the election tally evidence upon which to base a finding that the small participation therein was nevertheless actually representative. In the *New York Handkerchief Co.* case and the *National Mineral* case, the requisite additional evidence was the employer's interference with the election, tending to prevent employees from voting; and in the *Emergency Hospital* case, the high rate of turnover among the employees between the pay-roll date for determining eligible voters and the election date made it probable that those participating in the election were actually a majority of those then entitled to vote.

Now, if minority participation should ever be sanctioned, it should not be in Standard's case. The only "investigation" by the Board was to count the vote. There is not a shred of evidence in the record to justify a finding that the minority vote was actually representative of the wishes of a majority of employees.

The record contains the Board's stipulation that the Company, far from interfering or coercing, cooperated in every way to obtain a fair election (R. 10, 20-23). There is no evidence of abnormal turnover of employees

(R. 25). There was no investigation conducted by the Board, and the record is entirely silent in this case of any such investigation having been conducted for the purpose of determining whether the vote was actually representative. There was no evidence before the Board tending to show that any one who wanted A. F. of L. representation had not voted for it. Indeed, the second election again resulting in a minority turnout was affirmative evidence that the vote was not representative.

The fact is that the Board, with nothing but the minority vote before it, with no additional investigation, and with no evidence from which to conclude that the minority election showed the wishes of the majority, certified the union as the sole bargaining agent for all.

Without the "investigation" required by the *Hospital* case, the Board violated the mandate in that case and in the *New York Handkerchief Co.* case that its authority to certify representatives in minority elections "must not be employed arbitrarily". Acting upon no evidence at all is the clearest case of arbitrary action.

**The Board's Elimination of "Neither" From the Ballot.**

When the Board eliminated "Neither" from the ballot it was not exercising an "administrative discretion". It thereby made a decision for the employees which, as a part of any fair election process should have been determined by the voters themselves. The Board had no right to strike "Neither" from the ballot and thus disregard the three-cornered antagonism generally found between the supporters of rival unions and no unions. Union members know that with sole bargaining power in a rival union's hands they might later be forced, by a closed shop agreement, to change their affiliation, and non-union members know that they might be forced by a

closed shop agreement to join a union which they have consistently refused to join. Supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. There is no way of telling what vote "Neither" would have polled if it had been on the ballot at the second election.

With both the ballot box and the employees available, what they desired on this score was not a matter for the "considered judgment" of the Board. The employees were there to decide that issue for themselves. They should have been permitted to decide at the ballot box whether they preferred "Neither" to a run-off vote later between the two unions. Successive "run off" elections are common Board practice. See *Fairchild Engine & Airplane Corp.*, 31 NLRB No. 137, 32 NLRB No. 99, 33 NLRB No. 83 (1941); *Aluminum Co. of America*, 12 NLRB 237 (1939).

In short, the statute contemplates a designation or selection of the sole bargaining agent by the ballot of the employees, if an election is held, and not partly by such ballot and partly by the election of the Board.

Similar action by the Board was held illegal by the Sixth Circuit in *NLRB vs. International Brotherhood*, 105 Fed. (2) 598 (CCA 6th, 1939), revd. on other gr. 308 U. S. 413 (1940). There, practically all the employees voted in the first election. The CIO nosed out the AFL, but in view of the "Neither" vote, neither union received a majority. The Board decided the next step itself, instead of submitting it to the voters. It struck one of the two contesting unions from the ballot. The Court said:

> "* * * We think the order was illegal and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice * * *."

See also—

International Brotherhood vs. N. L. R. B., 41 Fed. Supp. 57, 59 (E. D. Mich. 1940):

("Such so-called run-off election is in legal contemplation a new election.")

In eliminating "Neither," the Board disfranchised all those who would have voted "Neither". And worse than that, it treated them as actually voting for the leading union. The Board which has disfranchised this group of employees, has said,

> "We will count all who do not vote as voting for the union that receives the larger number of votes in the run-off election."

This action of the Board cannot be justified because Section 1 of the Act declares a policy to "encourage" collective bargaining. "Encourage" does not mean to force; it does not mean to override the employees' wishes, or to guess at their wishes when they are there to vote on it themselves.

## CONCLUSION.

We submit that for the reasons stated, the petition for writ of certiorari to the Circuit Court below should be granted.

Respectfully submitted,

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# APPENDIX OF STATUTES CITED.

## I.

## STATUTES SUPPORTING SUPREME COURT'S JURISDICTION.

**(Judicial Code, section 240, amended.) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; * * *.**

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal. (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

Judicial Code, Sec. 240 (a).
28 U. S. C., Sec. 347 (a).

**Petition to court for enforcement of order; proceedings; review of judgment.**

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair

labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 346 and 347 of Title 28. (June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, Sec. 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921.)

NLRA, Sec. 10 (e).
29 U. S. C., Sec. 160 (e).

## II.

## CERTAIN PROVISIONS OF NATIONAL LABOR RELATIONS ACT.

**Representatives of employees for collective bargaining; * * * question affecting commerce, hearing; * * *.**

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such units for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such in-

vestigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives. (July 5, 1935, c. 372, Sec. 9, 49 Stat. 453.)

NLRA, Sec. 9 (a), (c).
29 U. S. C., Sec. 159 (a), (c).

**Findings and declaration of policy.**

The denial by employers of *the right of employees to organize* and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess *full freedom of association* or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that *protection by law of the right of employees to organize* and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, Sec. 1, 49 Stat. 449. (Italics ours.)

NLRA, Sec. 1.
29 U. S. C., Sec. 151.

## III.

## ELECTION PROVISION OF THE RAILWAY LABOR ACT.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. (May 20, 1926, c. 347, Sec. 2, 44 Stat. 577; June 21, 1934, c. 691, Sec. 2, 48 Stat. 1186.)

RLA, Sec. 2, Fourth.
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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 127

STANDARD LIME AND STONE COMPANY, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (R. 45–53) was issued on May 11, 1943, and has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–4, 5–17) are reported in 57 N. L. R. B. 227. The decisions of the Board in prior representation proceedings, which form part of the record in this case (R. 27–39), are reported in 48 N. L. R. B. 424 and 50 N. L. R. B. 34.

## JURISDICTION

The decree of the court below was entered on May 11, 1945 (R. 53–54). The petition for a writ of certiorari was filed on June 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

## QUESTIONS PRESENTED

1. Whether the Board may properly certify a labor organization as collective bargaining representative of the employees in an appropriate unit on the basis of an election in which less than a majority of the employees in the unit cast ballots.[1]

2. Whether, when the Board conducts an election to determine whether the employees in an appropriate unit desire to be represented by one of two labor organizations, or by neither of them, and the election results in no choice on the ballot receiving a majority of the votes cast but with the choice "neither" receiving fewer votes than either of the labor organizations, the Board may, in the exercise of its administrative discretion in

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[1] We believe that the second question urged by petitioner, namely, whether the Board, before certifying a labor organization on the basis of an election in which less than a majority of eligibles participated, must "have before it additional evidence sufficient to justify a finding that the majority vote was, in fact, truly representative" (Pet. 3) is not a separate question but is disposed of by the answer to the first question.

conducting a run-off election, omit the choice "neither" from the ballot.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*) are set forth in the Appendix to the petition for writ of certiorari, pp. 21–24.

## STATEMENT

In a proceeding under Section 9 (c) of the Act instituted by the filing of a petition by the UMW [2] for the investigation and certification of representatives the Board held a hearing in which petitioner, the UMW, and the Union [3] participated (R. 20). Thereafter the Board issued a decision and direction of election among petitioner's maintenance and production employees, who it found constituted an appropriate bargaining unit (R. 27–33). In the election, held on April 13, 1943, the employees were given opportunity to vote for the Union, for the UMW, or for "neither" (R. 20, 34). The results of the election were inconclusive. Of 439 employees eligible to vote, 218 cast ballots, of which 99 were for the Union, 62 for the UMW, and 57 for "neither" (R. 20, 34). Thereafter the Board's Regional Director issued

[2] United Construction Workers, Division of District 50, United Mine Workers of America, Local 202.

[3] United Cement, Lime and Gypsum Workers International Union, A. F. of L.

a report on the election recommending that the petition for certification be dismissed unless within 10 days one of the two labor organizations requested a run-off election (R. 21). Petitioner filed exceptions to the recommendation with respect to a run-off election and moved that the petition be dismissed (R. 21). Both the Union and the UMW duly requested that a run-off election be held (*id.*). On April 28, 1943, the Board issued a Supplemental Decision and Second Direction of Election, overruling petitioner's motion and directing a run-off election between the Union and the UMW (R. 21, 34–36). The run-off election was held on May 13, 1943. Of the 409 employees eligible to vote in the run-off election 166 cast ballots, of which 137 were for the Union, 28 were for the UMW, and 1 was void (R. 22, 37). Thereafter the Regional Director issued a report on the run-off election in which he recommended that the Board certify the Union as the statutory representative of petitioner's employees in the above-described unit (R. 22, 37; Bd. Exh. 2–AA). Petitioned filed objections to the Regional Director's report and to the recommendation with respect to certification of the Union on the ground that a majority of the eligible employees in the unit had not participated in either election (R. 23; Bd. Exh. 2–EE). On June 1, 1943, the Board issued a Supplemental Decision and Certification of Representatives in which it overruled petitioner's objections and certified the Union as the exclusive

bargaining representative of the employees within the unit found to be appropriate (R. 37–39; 50 N. L. R. B. 34).

Thereafter petitioner refused to bargain with the Union upon request (R. 23–24) and the Board, in a proceeding under Section 10 (c) of the Act, issued a decision in which it found that petitioner's refusal to bargain constituted a violation of Section 8 (5) and (1) of the Act (R. 1–3, 5–16), and an order requiring petitioner to cease and desist from its unfair labor practices, upon request to bargain with the Union, and to post appropriate notices (R. 3–4).

Thereafter the Board filed in the court below a petition for enforcement of its order (R. 41–44), and on May 11, 1944, the court handed down its opinion and entered its decree enforcing the order (R. 45–54).

## ARGUMENT

1. Petitioner's contention that the Board could not validly certify the Union upon the basis of elections in which less than a majority of the eligible employees participated is without merit. The legislative history of the Act and the uniform decisions of the courts are to the contrary, and this Court declined to review precisely this question in *Central Dispensary and Emergency Hospital* v. *National Labor Relations Board*, No. 819, last Term, certiorari denied February 26, 1945.

Congress in providing in Section 9 (a) of the Act, that "Representatives designated or selected * * * by the majority of the employees" in an appropriate unit "shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * *", clearly intended the selection of such representatives to be determined, as in political elections, by the majority vote of those participating in the selection. Prior to the passage of the Act Congress had adopted this principle in the Railway Labor Act.[4] That Congress intended to incorporate the same principle in the National Labor Relations Act is clear from the Report of the House Committee on Labor on the bill which became the Act. The Report stated that "the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern."[5] Peti-

[4] Section 2, Fourth, of the Railway Labor Act (45 U. S. C., Sec. 152 (4)) provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The Report of the Senate Committee on Interstate Commerce which accompanied the bill stated that "the bill specifically provides that the choice of representatives of any craft shall be determined *by a majority of the employees voting on the question*," (italics supplied). Report No. 1065, 73rd Cong., 2nd Sess., p. 2.

[5] House Report No. 1147, 74th Cong., 1st Sess., p. 3.

tioner's contention (Br. pp. 9–11) that since Section 9 (a) of the National Labor Relations Act is worded differently from Section 2, Fourth, of the Railway Labor Act the two statutes cannot be construed as contemplating the same principle with respect to the requirement of majority participation in elections, is not only in the teeth of all the judicial authority on the point (*infra*, pp. 8–9) but on its face is unsupportable in view of the statement of the House Committee quoted above (*supra*, p. 6) and the indications elsewhere in the Reports of both the House and Senate Committees that the National Labor Relations Act was intended to incorporate the familiar majority rule principle long sanctioned by "governmental practices" and "democratic institutions." Senate Report No. 573, 74th Cong., 1st Sess., p. 13; House Report No. 1147, 74th Cong., 1st Sess., pp. 21–22.[6]

As the court below correctly held (R. 46–47), this Court supplied the "conclusive answer" to the question of majority participation in elections of employee representatives in *Virginian*

[6] These expressions of congressional intent clearly constitute a rejection of the quorum rule or "corporate stockholders' election" analogy advanced by petitioner (Pet. 7–8). The latter analogy, moreover, as the court below noted (R. 49–50), does not support petitioner's contention, in any event, since the general rule with respect thereto is that where an act is "to be performed by the constituent members of the corporation" the political rule applies, i. e. "a majority of those who appear may act." *Morrill* v. *Little Falls Mfg. Co.*, 53 Minn. 371, 377, 55 N. W. 547, 549; 13 Am Jur., Corp., § 480.

*Railway Co.* v. *System Federation No. 40,* 300 U. S. 515. There the Court specifically rejected the Company's contention that Section 2, Fourth of the Railway Labor Act required "that a representative be selected by the votes of a majority of eligible voters" and held that the political rule "requiring only the consent of the specified majority of those participating in the election" was intended by the statute (300 U. S. at 560).[7]

The Board and the courts have uniformly applied the principle of the *Virginian Railway* case in cases arising under the National Labor Relations Act, as the court below observed (R. 49). *National Labor Relations Board* v. *Central Dispensary and Emergency Hospital,* 145 F. 2d 852, 853 (App. D. C.), certiorari denied February 26, 1945, No. 819, last Term; *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. 2d 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.,* 134 F. 2d 424, 426–428 (C. C. A. 7), certiorari denied, 320 U. S. 753; *National Labor Relations Board* v. *Whittier*

[7] The political election rule makes no distinction based upon the number of participants. See *Carroll County* v. *Smith,* 111 U. S. 556, cited by the Court in the *Virginian Railway* opinion, 300 U. S. at 560, and *St. Joseph Township* v. *Rogers,* 16 Wall. 644. Thus the court below properly held (R. 49) that the circumstance that in the *Virginian Railway* case a majority of those eligible to vote participated in the election affords no basis for distinguishing that case from the instant case.

*Mills Co.*, 111 F. 2d 474, 477–478 (C. C. A. 5); *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. 2d 586, 588 (C. C. A. 2), certiorari denied 313 U. S. 594; *Matter of Western Foundry Co.*, 42 N. L. R. B. 302; *Matter of Spring City Foundry*, 11 N. L. R. B. 1286; *Matter of R. C. A. Mfg. Co., Inc.*, 2 N. L. R. B., 11 N. L. R. B. 159, 173–179. There are no contrary decisions.

In its decision herein the Board stated that "where less than a majority of eligible employees participate in Board elections a question as to the representative character of the vote is raised" (R. 3). Following its established policy in such cases the Board examined the record to determine the question. The participation in the two elections represented 49 percent and 40 percent, respectively, of the electorate (R. 34, 37). The Board concluded that "the facts disclosed by this record convince us that the vote herein was substantial and representative * * *" (R. 3). Petitioner argues that the Board's conclusion to this effect was "arbitrary" and therefore improper because the Board failed to conduct an "additional investigation" and to adduce additional "evidence from which to conclude that the minority election showed the wishes of the majority" (Br. pp. 17–18). But the purpose of the Board's investigation to determine the representative character of a minority vote obviously is not to establish the *actual* wishes of the majority.

Such a procedure would be a negation of the very principle enunciated in the *Virginian Railway* decision. The purpose of the Board's investigation is simply to determine whether "all of those eligible were given adequate opportunity to vote" and whether a "substantial" and "representative number of eligible employees [did] participate" (National Labor Relations Board, *Eighth Annual Report* (1943), p. 52). See also *Sixth Annual Report* (1941) p. 62, and *Ninth Annual Report* (1944), pp. 32–33. In short the Board's practice in this respect is not to apply the *Virginian Railway* principle blindly and issue certifications automatically upon the basis of elections in which only a minority participates, but as a matter of discretion to limit the application of the principle to cases in which the participation in the election is sufficiently substantial and representative to warrant the presumption that "those who do not participate * * * 'assent to the expressed will of the majority of those voting'" (The *Virginian Railway* case, 300 U. S. at 560).[8] We submit that the Board's administrative practice in this respect is reasonable and proper (the *Central Dispensary*

[8] The Board does not always consider the presumption warranted. For example in *Matter of Weinberger Sales Co., Inc.*, 28 N. L. R. B. 154 (54 out of 540 eligibles voted); *Matter of S. A. Kendall, Jr.*, 41 N. L. R. B. 395, 397 (1 out of 3 eligibles voted); and *Matter of Bernard Gold and Jack Wasserman*, 54 N. L. R. B. 869, 55 N. L. R. B. 591 (1 out of 2 eligibles voted), the Board refused to issue certifications on the ground that the elections were not representative.

case, *supra*, 145 F. 2d at 854) and that it was properly applied in the instant case, as the court below held (R. 49–52).

2. Petitioner's contention that the Board exceeded its authority in dropping the choice "neither" from the ballot in the run-off election is without merit and, in any event, does not present a question warranting review by this Court. Petitioner does not question the propriety of the Board's practice of conducting run-off elections where original elections are inconclusive. Petitioner's sole contention as to this phase of the case is that the Act compels the Board in conducting run-off elections to afford the employees opportunity to vote *against* the labor organizations appearing on the ballot even where, as in the instant case, the choice "neither" received the lowest number of votes in the first election. We submit that the Board's action in the present case was reasonable on its face. As the court below declared, "It could not be unreasonable to drop in the run-off the choice which had received the lowest number of votes" (R. 52). Indeed, far from being arbitrary, the Board's solution of the representation question in the present case and its use generally of the run-off election device as part of its procedure under Section 9 (c) of the Act is the result of the Board's wide experience and the exercise of its considered judgment in dealing with questions concerning employee representa-

tion. Where, as here, two unions participate in an election the Board regularly provides a space on the ballot for each union and also a space in which the employee may register his vote for "neither."[9] In such cases where the choice "neither" receives a majority of the votes cast the Board will generally dismiss the petition on the theory that the employees have indicated that they do not then wish to avail themselves of the statutory collective bargaining process.[10] Where, as here, the results of the election are inconclusive in that no single choice receives a majority of the votes cast but the two unions together poll a majority of the votes cast with the choice "neither" finishing in third place, the Board will, upon proper request by one of the unions, conduct a run-off election between the two unions, omitting the choice "neither" from the ballot.

The Board's policy in this respect is the outgrowth of its practical experience. Its earlier practice where two unions were involved in an inconclusive election was to provide a run-off election for or against the organization receiving the larger number of votes in the first election. *Matter of Coos Bay Lumber Company,* 16 N. L. R. B. 476, 477–480; National Labor Rela-

[9] National Labor Relations Board, *Third Annual Report* (1938), p. 145; *Ninth Annual Report* (1944), p. 31; *Matter of Interlake Iron Corporation,* 4 N. L. R. B. 55, 60–62.

[10] *Matter of The Colorado Fuel & Iron Corporation,* 30 N. L. R. B. 210.

tions Board, *Third Annual Report* (1938), pp. 149-150.[11] The Board's now settled practice of dropping the choice "neither" from the run-off election ballot, under the circumstances present here, was adopted in 1940, *Matter of R. K. LeBlond Machine Tool Co.*, 22 N. L. R. B. 465; National Labor Relations Board, *Fifth Annual Report* (1940), p. 60. This policy is based upon the Board's considered judgment that where in an original election the combined vote for the two labor organizations involved constitutes a majority of the votes cast, although neither of the labor organizations alone receives a majority of the votes, the majority of the employees have thereby expressed a desire to bargain collectively through some representative (the *LeBlond* case, *supra*, at p. 468). And since the declared policy of the Act is to encourage "the practice and procedure of collective bargaining" (the Act, Sec. 1) it follows that the purpose of the statute may reasonably be served in such a suitation by

[11] Where more than two organizations were involved in an inconclusive election the Board's former policy was to conduct successive run-off elections, omitting each time the organization receiving the smallest number of votes in the previous election, until a majority of the votes was cast for one of the remaining organizations or for "neither" or "none." *Matter of Aluminum Company of America*, 12 N. L. R. B. 237, 239; National Labor Relations Board, *Fourth Annual Report* (1939), pp. 80–81. The Board's present practice is to conduct only one run-off election. National Labor Relations Board, *Eighth Annual Report* (1943), p. 51.

affording the employees a further opportunity to agree upon a common representative. It is the Board's view that at least "any doubt should be resolved in favor of the presumption which is more likely to result in the choice of some collective representative" (the *LeBlond* case, *supra*, at pp. 468–469). "The objective of a run-off election is to permit a further opportunity for the selection of a representative and thus prevent the small number of employees who desire no representation from thwarting the wishes of the great majority who do desire collective bargaining" (*id.*). And where, as in the instant case, the question of whether the employees desire to avail themselves of the collective bargaining process provided by the Act has been answered unmistakably in the affirmative in the first election,[12] it is not unreasonable to "omit from the run-off ballot opportunity to vote again on that question" (*id.*).

The Board does not insist that its solution of the representation question herein is the only reasonable solution which could have been developed.[13]

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[12] Cf. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. 2d 598, 599, 600 (C. C. A. 6), reversed on other grounds, 308 U. S. 413.

[13] The Board necessarily continues to weigh the merits of policy rulings such as those here involved in order to keep its policies abreast of the realities which experience and changing circumstances bring to light. Since the elections herein were held the Board in re-examining its run-off election policy with a view to its practicality held a public hearing in August 1943, at which it solicited and heard the views

Nor does it contend that the solution suggested by petitioner (Br. p. 19) is entirely unreasonable.[14] The decision, however, was one for the Board to make in the exercise of its "wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees" (*Southern Steamship*

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of interested employers and labor organizations. National Labor Relations Board, *Eighth Annual Report* (1943), p. 51. Thereafter the Board codified in its Rules and Regulations its practice with respect to run-off elections. *Id.* pp. 51, 227–228; National Labor Relations Board, *Rules and Regulations*, Ser. 3, Art. III, Sec. 11. While the new rule reflects certain changes of policy, insofar as its application would affect the various interests involved in the situation presented by the instant case it does not differ in any material respect from the practice followed at the time the run-off election herein was ordered.

[14] Petitioner's reliance upon *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. 2d 598 (C. C. A. 6), reversed on other grounds, 308 U. S. 413, however, is misplaced. There the Board followed its earlier practice (*supra*, p. 12) of dropping from the ballot in the run-off election the union which had received the smaller number of votes in the first election. The court, in holding this action of the Board improper, in effect held that the Board should have conducted the run-off election between the two unions, which is precisely what the Board did in the instant case. The court declared that if the majority voted *against* the single candidate on the run-off ballot "nothing has been accomplished. No selection of representatives has been made and collective bargaining falls notwithstanding that in the first election * * * [the majority of the] voters indicated their desire for collective bargaining. The purpose of the election was to select, not to reject, representatives" (105 F. 2d at 600).

*Co.* v. *National Labor Relations Board,* 316 U. S. 31, 37). That other methods of dealing with the problem may have merit is not to say that the means adopted by the Board in this case were unreasonable and therefore represent an abuse of the Board's discretion. *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458; *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 194–196.

## CONCLUSION

The decision of the court below is correct and there is neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

October Term, 1944.

No. 1373.

STANDARD LIME AND STONE COMPANY,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## REPLY BRIEF

## SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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### THIS COURT'S RECENT DECISION IN HILL V. FLORIDA.

At pp. 6-7 of the petition for writ of certiorari, and at pp. 5, 18-20 of the supporting brief, we presented as an important question of federal law which has not been, but should be, settled by this Court, the following question:

Where the National Labor Relations Board holds an election with each of two unions and "Neither" on the ballot, with the result that neither of the unions nor "Neither" receives a majority of the votes cast, with "Neither" running third; and the Board eliminates

"Neither" from the ballot and holds a so called "run off" election between the two unions, does the Board's elimination of "Neither" from the ballot make the second election, and the Board's certification of the union based thereon, invalid?

We pointed out that when the Board eliminated "Neither" from the ballot at the second or run off election, the Board made a decision for the employees which the employees were there to decide for themselves.

The Board's elimination of "Neither" from the ballot disregarded the fact that, because of an elected union's power by a closed shop agreement to force members of a rival union to change affiliation, supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. The employees should have been permitted to decide at the ballot box whether they preferred "Neither" to a run off vote later between the two unions. The statute contemplates an election by the employees, not an election partly by the Board.

As shown at pp. 11-16 of the Board's brief in opposition to certiorari, its only reply is that although up to 1940, the Board would have considered itself in error if in this situation it had eliminated "Neither" (see the Board's brief, p. 12), nevertheless, in the Board's "considered judgment," as a result of its "wide experience," and as an outgrowth of its "practical experience," the Board now thinks that its elimination of "Neither" was proper because Sec. 1 of the Act declares a policy "to encourage" collective bargaining.

Since our petition and brief were printed, this Court has rendered its decision in *Hill v. Florida*, 65 S. Ct. 1373, where Florida's regulation of labor union activities was held improper as in irreconcilable conflict with the collective bargaining regulations of the National Labor Rela-

tions Act; and in so holding, this Court has certainly construed the Act to require elections by the employees, not partly by the employees and partly by the Board (see p. 1374):

> "* * * The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for any employer to interfere with, restrain or coerce employees in selecting their representatives. *Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide.* 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications." (Italics ours.)

And in his opinion partially dissenting, Mr. Chief Justice Stone was clearly of the same opinion (see p. 1376):

> "* * * The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not, by Sec. 7, confer the right on employees as against others as well as the employer to make an uninhibited choice of their bargaining agents. Cf. United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788. Section 7 confers the right of choice generally on employees and not merely as against the employer."

Now that this Court has spoken, it is even clearer that the Board's elimination of "Neither" cannot be justified because Section 1 of the Act declares a policy to "encourage" collective bargaining. "Encourage" does not mean to force; it does not mean to override the employees' wishes, or to guess at their wishes when they are there to vote on it themselves.

## CONCLUSION.

We submit that for the reasons stated in our petition, brief and reply brief, the petition for writ of certiorari to the Circuit Court below should be granted.

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